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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHARLES FRANCIS GAGNON
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
No. CR-79-1227

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QUESTIONS PRESENTED

A. Is an unnamed informer referred to in an affidavit for a search warrant reliable if the affidavit merely asserts that he is a long time resident of the area with no apparent reason to lie?

B. Can there be exigent circumstances which allow police officers to stay on searched premises after they have discovered and inventoried the evidence which they came to seize when at that time the authority granted them by the warrant has ceased.

C. Can the evidence of an informer conducting his own private investigation for the purpose of a criminal prosecution be used by police agents when the fruits of the investigation are the result of a trespass and burglary?

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B. THE SUPREME COURT SHOULD GRANT THIS WRIT OF CERTIORARI TO DETERMINE WHETHER OR NOT THE DOCTRINE OF "EXIGENT CIRCUMSTANCES" NOW EXISTING TO JUSTIFY SEARCHES WITHOUT WARRANTS SHOULD BE EXTENDED TO SEARCHES PURSUANT TO WARRANT WHEN THE AUTHORITY GRANTED IN THE WARRANT HAS CEASED.

C. THE SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE TO SET FORTH GUIDELINES CONCERNING POLICE AGENTS USING CITIZENS IN AN INVESTIGATIVE CAPACITY TO CIRCUMVENT CONSTITUTIONAL SAFEGUARDS RECONCILING THE TENTH CIRCUIT'S DECISION IN THIS CASE WITH THAT OF THE NINTH CIRCUIT IN *U.S. V. KRAAL*, 388 F. SUPP. 1372, *U.S. V. HAYES*, 551 F.2D. 767, AND WITH THE HOLDINGS SET FORTH IN *U.S. V. PAYNER*, U.S. (DECIDED JUNE, 1980).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT No. CR-79-1227

Petitioner, Charles Francis Gagnon, by his attorney, prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Tenth (10th) Circuit entered on November 26, 1980, with mandate stayed pending Certiorari.

I.
OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, which is attached hereto as Appendix A, was filed on the 26th day of November, 1980, with mandate stayed until April 5, 1981 pending Certiorari. Petition for rehearing was denied January 21, 1981.

II.
JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1), and 21 U.S.C. §802(15), 21 U.S.C. §841. The defendant was convicted of possession of marijuana with intent to distribute on Jan. 29, 1979. The U.S. court of appeals affirmed the conviction on November 26, 1980, and a motion for rehearing was denied on Jan. 22, 1981.

III.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution — 4th Amendment are set forth in Appendix B.

IV.
STATEMENT OF THE CASE

On November 19, 1978, Defendant's neighbor, J. R. Parks, a former reserve Hays County Deputy Sheriff, his minor son and minor brother, went deer hunting without permission on their neighbor's ranch. While searching for a deer stand left the previous year, the minors noticed a newly constructed barn. They examined the barn and noticed a large quantity of green leafy substance. They reported back to J. R. Parks who proceeded to the barn and retrieved a sample. Parks then called a police official from the State of New Mexico who called the Oklahoma State Bureau of Narcotic and Dangerous Drug Control. The drug agents arrived at Parks' ranch, took the sample and had it field tested, which showed positive for cannabis. The state agents then proceeded to Muskogee, Oklahoma, several counties away, and presented an affidavit for a search warrant to the federal magistrate there.

The warrant stated that a confidential informer was on the premises looking for a deer stand and noticed a new barn, retrieved a leafy substance, presented it to the Oklahoma officials which was field tested postive for marijuana. The affidavit then went on to state that the confidential informer was a long time resident of the area with no apparent reason to lie and no criminal record, with no further allegations of reliability.

The agents then proceeded to the ranch, searched it and found marijuana in the barn. On the 21st of November the agents presented a similar application for warrant based on reallegations contained in the first application and a further allegation that there was a trailer house on the property and items similar to those found in the barn were viewed through the window of the trailer house. The agents asked for permission to search the trailer and a warrant was issued on the 24th of November. Evidence from the trailer was submitted to a chemist in Oklahoma City prior to that date.

On the 20th of November the agents entered the barn and discovered a large volume of marijuana. They camped out on the premises that day and overnight waiting for a four wheel drive pickup to arrive to haul away the marijuana. The following day the Defendant arrived. During a conversation with the agents one agent spotted a small amount of marijuana on the floor of his pickup camper and arrested the Defendant for possession of marijuana. His vehicle was then seized and searched.

On January 3, 1979, a hearing was held on the Defendant's Motion to Suppress. The court conditionally overruled the motion pending a determination on the Defendant's Motion to Disclose the Informant's Identity. On the 22nd of January a further hearing was held concerning the Defendant's Motion to Suppress Evidence, after the identity of the informer was disclosed. That Motion was denied. On January 29, a jury trial was held and on the 31st of January the Defendant was found guilty.

At the trial evidence taken from the barn was admitted and a glass bottle containing suspected marijuana taken from the trailer logged into the Oklahoma City lab two days before the warrant was issued was admitted into evidence. A chemist for the State of Oklahoma testified the substance was marijuana and a pharmacognocist from

Oregon testified that no one could tell what the substance was based on the tests used by the Oklahoma chemist. He further stated that there were three species of marijuana and that the substance viewed was not cannabis sativa L. A witness then testified as to the identity of the Defendant, stating he had been shown several pictures by police agents; however, when the Defendant asked for the pictures, they couldn't be produced.

On March 1st the Defendant was sentenced to two years confinement.

V.
REASONS FOR GRANTING THE WRIT

A. THE SUPREME COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE TENTH CIRCUIT COURT OF APPEALS' HOLDING THAT AN INFORMER IDENTIFIED IN A SEARCH WARRANT APPLICATION AS A CONFIDENTIAL INFORMANT DOESN'T HAVE TO BE RELIABLE IF, AFTER A DISCLOSURE OF THE INFORMER'S IDENTITY, HE TURNS OUT TO BE A NEIGHBOR, IS CONTRARY TO HOLDINGS IN THE FIRST, SECOND, THIRD, FIFTH, SIXTH, SEVENTH, EIGHTH, NINTH, TENTH AND DISTRICT OF COLUMBIA CIRCUITS. THERE IS NO DEFINITIVE RULING OR DISCUSSION OF THE STATUS OF UNNAMED CITIZEN INFORMERS BY THIS HONORABLE COURT, CAUSING CONFUSION AND DIVERSE RULINGS AMONG THE CIRCUITS.

It would seem to be good policy that the requirements set forth in *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *U.S.*, 393 U.S. 410 regarding reliability be somewhat relaxed in the case of citizen informers or winesses to a crime. Sound public policy dictates that citizens observing criminal activity should report this activity to the proper authorities, however citizens should also be protected from unwarranted searches and seizures and from possible harassment by revenge seekers or pranksters. The anonymous tip can be used to send many a police agent on a wild goose chase to harass the citizenry with searches based upon anonymous tips. The Court has repeatedly stated that tips do not constitute probable cause. When an individual is named in an application he submits himself to the penalties for providing false information, libel, slander, false arrest and malicious prosecution. This can't be done when the information is based upon a tipster.

In the application in the present case the officers presenting the affidavit to the magistrate stated in the affidavit that the informer had no apparent reason to lie. It should be up to the magistrate to determine whether or not the informer has an apparent reason to lie, not the police officers presenting the information to the magistrate. The magistrate should make the factual determinations, not the police officers, otherwise there is no independent judicial review.

Furthermore, the issue to be determined whether by police officer or magistrate but preferably by the magistrate is not whether the informant had an apparent reason to lie, but what facts indicate that the informer has apparent reason for telling the truth.

In the present case police agents had information from a person whom they presented to the magistrate as a confidential informant who provided them with a sample of marijuana that was field tested. The marijuana could have come from anywhere but the confidential informer without any indicia of reliability stated that it came from his neighbor's ranch. The magistrate didn't know it was his neighbor's ranch and knew nothing more than the fact that the informant was a trespasser on the ranch, had no criminal record and no apparent reason to lie.

Only after several hours of testimony and a trial court order to disclose the identity of the informer was it determined to be a neighbor. However, this fact was not made known to the magistrate when the warrant was issued. Since the ruling of the Tenth Circuit digresses from the other circuits a petition for certiorate should be granted in order that this Honorable Court set forth guidelines concenrning citizens providing information to the police which can be applied uniformly throughout the circuits.

Each circuit for the United States Court of Appeals, except the Fourth Circuit, has ruled on the issue of whether or not a citizen-neighbor informant needs to be proved reliable when information attributed to the citizen neighbor-informant is used in the application for a search warrant. This Honorable Court in *Whiteley* v. *Warden*, 401 U.S. 560 indicated that something more than an informer's tip was necessary for a magistrate to find probable cause upon which to issue a search warrant.

Most circuits differentiate between an unknown's tip and that of

a named citizen. The 1st, 2nd, 5th, 6th, 9th and District of Columbia circuits have held that the naming of an informant in an affidavit furnishes the reliability. *U.S.* v. *Principe*, 499 F.2d. 1135 (1st Cir. 1974), *U.S.* v. *Rollins*, 522 F.2d. 160 (2nd Cir. 1975), *U.S.* v. *Bell*, 457 F.2d. 1231 (1972), *U.S.* v. *Jensen*, 432 F.2d. 861 (6th Cir. 1970), and *Cundiff* v. *U.S.*, 501 F.2d. 188 (8th Cir. 1974). The Third Circuit in *U.S.* v. *Yeager*, 488 F.2d. 74 (1971) and the Seventh Circuit in *U.S.* v. *Unger*, 469 F.2d. 1283 (1972) and *U.S.* v. *Spach*, 518 F.2d. 866 (1975), indicate that naming an informant in a warrant application is not enough without some further information regarding reliability.

However the Seventh Circuit seems to be somewhat in conflict in the holdings in *Unger* and *Spach.*, supra. The former seems to indicate that a citizen need not be named if he is identified as a citizen although the latter indicated the contrary, holding that the name of the citizen is just one factor in determining reliability. The Tenth Circuit, in *U.S.* v. *McCoy*, 478 F.2d. 176, indicated that reliability need not be shown if the warrant application set forth information gathered from named persons who are witnesses to a crime. However, in the present case with *U.S.* v. *Gagnon*, the dictates of McCoy were not followed.

B. THE SUPREME COURT SHOULD GRANT THIS WRIT OF CERTIORARI TO DETERMINE WHETHER OR NOT THE DOCTRINE OF "EXIGENT CIRCUMSTANCES" NOW EXISTING TO JUSTIFY SEARCHES WITHOUT WARRANTS SHOULD BE EXTENDED TO SEARCHES PURSUANT TO WARRANT WHEN THE AUTHORITY GRANTED IN THE WARRANT HAS CEASED.

This court has set forth the rule that there are times when exigent circumstances relax the requirement under the Fourth Amendment to the Constitution of the United States that a search warrant be obtained before a search can be made. Exigent circumstances are found to exist when a crime is in process, a vehicle is involved, items are in plain view, or weapons might be in the proximity which could endanger law enforcement officials. (citations omitted).

These exigent circumstance thus far have only applied to the requirement of setting forth facts to an independent magistrate in order that probable cause to issue a warrant be determined. The net

effect of the exigent circumstances concept is to make the probable cause finding retroactive to before the search although the hearing may have been held after the search.

The Tenth Circuit, in its opinion in this case, is trying to extend the concept of exigent circumstance to an area not contemplated by this Court by holding that theses exigent circumstances prevented full execution of the November 20th warrant. It should be noted that the agents applied for permission to stake out the premises to look for suspects in their application for the warrant. The Tenth Circuit Court of Appeals in its opinion recognized that authority under search warrant expires and further governmental intrusion must cease when the purpose of the search ended, citing *Levin* v. *Blair*, 17 F.2d. 151 (Eastern Dist. Pa, 1927), and *Mellet and Nichter Brewing Company* v. *United States*, 296 Fed. 765 (Eastern Dist. Pa., 1923).

By applying the concept of exigent circumstances to the expired authority in a search warrant the Tenth Circuit is making new law which is not based on precedent and which is contrary to the policies set forth by this Court in *Andresen* v. *Maryland*, 427 U.S. 463.

This Court should decide whether or not the concept of exigent circumstances should be applied to situations where the authority to search is ended and agents remain on premises. A ruling such as that of the Tenth Circuit could be the subject of much abuse by law enforcement agents who could conceivably change exigent circumstances into a license or even leasehold. The ramifications of such holding should clearly be looked at by this Court and parameters set.

C. THE SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE TO SET FORTH GUIDELINES CONCERNING POLICE AGENTS USING CITIZENS IN AN INVESTIGATIVE CAPACITY TO CIRCUMVENT CONSTITUTIONAL SAFEGUARDS RECONCILING THE TENTH CIRCUIT'S DECISION IN THIS CASE WITH THAT OF THE NINTH CIRCUIT IN *U.S. V. KRAAL*, 388 F.SUPP. 1372, *U.S. V. HAYES*, 551 F.2D. 767, AND WITH THE HOLDINGS SET FORTH IN *U.S. V. PAYNER*, U.S. (DECIDED JUNE, 1980).

The Ninth Circuit in *U.S.* v.*Hays*, 551 F.2d. 767 ruled that an employee of an air freight service could not regularly inspect suspicious looking packages for evidence of criminal activity for the purposes of obtaining evidence for prosecution. A District Court in Alaska held that air freight employees couldn't search packages looking for evidence of criminal activity because their customers looked suspicious, *U.S.* v. *Kraal*, 388 F.Supp. 1372.

Those cases discussed the concept of private citizens acting as de facto police agents doing for federal or state investigatory agents that which couldn't be done by the agents due to the proseriptions in the United States Constitution. In the present case the District Court ruled that although Mr. Gagnon's neighbor carried a police commission card, he wasn't acting as a police agent at the time he trespassed upon Mr. Gagnon's property to obtain evidence in the form of a marijuana sample.

The Court of Appeals did not disturb that ruling but failed to rule whether or not the neighbor was acting as a de facto police agent investigating a neighbor solely for the purpose of presenting evidence of criminal activity to the authorities.

In light of this court's ruling in the *United States* v. *Payner*, U.S. , 100 S.Ct. 2439 (1980) and the possible abuses that could stem from the use of private citizens as investigators by federal agents, this Court should set forth some guidelines as to when private citizens can be used to investigate and to what extent they can be used, particularly when the citizen's activities or private investigator's activities come into conflict with the Constitution of the United States.

The evidence is clear in the Gagnon case that if his neighbor were a police officer at the time, that his conduct would have been prescribed by the Fourth Amendment, however since he was a private citizen, his conduct wasn't prohibited. The evidence is clear that the neighbor, Mr. Parks, trespassed on the land and retrieved the marijuana sample solely for the purpose of turning it over to authorities as evidence in a criminal prosecution.

The court's language in Payner could be construed by law enforcement officers as a license to use citizens and private investigators in such a manner as to flagrantly violate the dictates of the Constitution and the rights of the citizenry. Although Mr. Payner had no standing to complain of unconstitutional acts committed

upon a third party, Mr. Gagnon has such standing because the search was directed at him. Not only are guidelines regarding the admissibility of evidence under the Fourth Amendment needed, but guidelines to the police use of informants and private investigators issued under the general supervisory power of this Court are also needed.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 79-1227

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES FRANCIS GAGNON,

Defendant-Appellant.

___ F2d ___

Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 78-133-1)

Dennis L. Blewitt of Barnard & Ferguson, Boulder, Colorado, (Albert Matthews, Muskogee, Oklahoma, with him on the brief), for Defendant-Appellant.

James E. Edmondson, Assistant United States Attorney (Julian K. Fite, United States Attorney, with him on the brief), Muskogee, Oklahoma, for Plantiff-Appellee.

Heard before HOLLOWAY, DOYLE and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

Charles Francis Gagnon appeals from a judgment of conviction after a jury trial for possessing with intent to distribute marijuana, a controlled substance, in violation of 21 U.S.C. § 841. Gagnon raises nine claims on appeal, each of which is separately discussed hereafter. We conclude each of the arguments is without merit and affirm.

In reviewing findings of fact we must examine the evidence in the light most favorable to the appellee. The record showed the following. On November 19, 1978, two members of a deer hunting party set out to retrieve a deer stand they had previously left on an 1,800-acre ranch known as Old Brooks Bottom located near Calvin, Oklahoma. While there, they accidentally discovered a large newly constructed metal barn. Peering through a small crack above a locked door, the two curious hunters saw in the barn a large quantity of a green leafy substance which they suspected was marijuana. They summoned J.R. Parks, a member of the hunting party and a former volunteer special deputy for Hughes County, to view the contents of the barn. Parks looked inside and concluded that it was full of marijuana. He was able to locate a three-inch gap between the ground and the metal siding through which he secured a handful of the substance he intended to present to proper authorities. Parks telephoned Agent Means of the Oklahoma State Bureau of Narcotics and Dangerous Drugs. Means and three other agents drove immediately to Calvin to meet with Parks and to perform a field test on the sample Parks had retrieved from the barn. The field test indicated marijuana. After receiving precise directions to the ranch, the agents obtained a search warrant authorizing them to enter the property and search the barn for marijuana.

On November 20 the agents entered the barn and discovered, among other things, seven large tarpaulins covered with drying marijuana leaves. The agents were unable to transport the large volume of marijuana in their automobiles and felt compelled to remain on the premises until a four-wheel drive pickup truck arrived from Oklahoma City the following day. On November 21, before the transport vehicle had arrived, defendant Gagnon encountered the agents when he approached the barn in a pick-

up truck loaded with a camper. Following a brief conversation during which one of the agents observed marijuana lying on the floor of the camper, Gagnon was arrested for possession of marijuana and his vehicle was searched.

The search revealed a cardboard carton identical to cartons found in the barn, keys fitting the lock on the gate to the property and the lock on the barn, and other items similar or identical to items found in the barn. Gagnon was then placed under arrest for possession of marijuana with intent to distribute. He was subsequently indicted and convicted by the jury of violating 21 U.S.C. § 841.

I.

We consider first Gagnon's claim that the district court erred in admitting into evidence marijuana and other items obtained pursuant to the search warrants. Gagnon argues the affidavits supporting the search warrants did not establish probable cause under Aguilar v. Texas, 378 U.S. 108 (1964), which requires that affidavits based on information provided by an informant contain sufficient detail to satisfy the magistrate that (1) the informant has in fact observed the facts recited in the affidavit and (2) the informant is reliable. *See* Franks v. Delaware, 438 U.S. 154, 165 (1978). Gagnon argues Agent Means' affidavits failed to meet the second requirement of *Aguilar* that there be some showing of the informant's reliability since they did not recite that Parks was known historically to be a reliable informant.

We have long subscribed to the rule that an affidavit need not set forth facts of a named person's prior history as a reliable informant when the informant is a citizen/neighbor eyewitness with no apparent ulterior motive for providing false information. United States v. McCoy, 478 F.2d 176, 179 (10th Cir. 1973); *see also* Rutherford v. Cupp, 508 F.2d 122, 123 (9th Cir. 1974), *cert. denied*, 421 U.S. 933 (1975). We will not disturb the district court's factual determination that Parks was an unpaid nonprofessional informant with no apparent motive to fabricate.

Gagnon also contends the affidavits lacked sufficient facts

upon which the magistrate could reasonably conclude the information provided by Parks was reliable. We disagree. The magistrate was informed that Parks, a casual hunter on Old Brooks Bottom, had personally viewed the suspicious contents of a newly constructed barn, had provided a sample of the contents to the proper state authorities, and that the sample had proved to be marijuana. We conclude the magistrate was sufficiently informed of the underlying circumstances from which the affiant concluded the informant's tip was reliable. *See* United States v. Ventresca, 380 U.S. 102, 108 (1965); Edmondson v. United States, 402 F.2nd 809, 812 (10th Cir. 1968); Schutz v. United States, 395 F.2d 225, 229 (10th Cir. 1968).

II.

We turn next to Gagnon's claim that the agents, having conducted their search on November 20 and discovered the contraband specified in the warrant, had no authority to remain on the premises until November 21 when Gagnon was arrested. We agree that once a search warrant has been fully executed and the fruits of the search secured, the authority under the warrant expires and further governmental intrusion must cease. *See* Levin v. Blair, 17 F.2d 151 (E.D. Pa. 1927); Mellet & Nichter Brewing Co. v. United States, 296 F. 765 (E.D. Pa. 1923).

Nevertheless, we conclude that exigent circumstances in this case prevented full execution of the warrant on November 20, and justified the prolonged governmental intrusion. The agents were responsible for securing the marijuana until it could be disposed of and were justified in staying on the premises until it could be removed from the property. The government's intrusion under the circumstances was minimal. The barn was located on uninhabited land; the agents slept in their vehicles and avoided any unreasonable interference with the property. The agents' continued presence on the property was justified "under a system of justice responsive both to the needs of individual liberty and to the rights of the community." United States v. Ventresca, 380 U.S. at 112.

III

We also find no merit in Gagnon's claim that the evidence seized from his pickup truck was the fruit of an illegal search and therefore improperly admitted by the district court. The validity of the search in this case depends on the validity of Gagnon's arrest. Beck v. Ohio, 379 U.S. 89, 91 (1964). *Beck* instructs that the validity of an arrest depends "upon whether, at the moment the arrest was made . . . the facts and circumstances within [the arresting officer's] knowledge . . . were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Id.*

Based on testimony at the suppression hearing that Agent Dempewolf arrested Gagnon after personally viewing marijuana in Gagnon's pickup truck, the district court concluded the arrest was valid. It is well established that at a hearing "on a motion to suppress the credibility of the witnesses and the weight to be given the evidence, together with the inferences, deductions, and conclusions fairly and reasonably to be drawn from the evidence, are to be determined by the trial judge," whose determinations we must accept unless clearly erroneous. United States v. Donahue, 442 F.2d 1315, 1316 (10th Cir. 1971). We find no error in the district court's determination that Gagnon's arrest was supported by probable cause, or in its conclusion that the search of Gagnon's pickup truck incident to the arrest was lawful. *See* Adams v. Williams, 407 U.S. 143, 149 (1971); Carroll v. United States, 267 U.S. 132 (1925). The fruits of the search were properly admitted.

IV

Gagnon contends that the informant Parks was "a de facto police agent" cloaked with state authority and, therefore, subject to the Fourth Amendment restraints on warrantless searches and seizures. That is a question of fact, our examination of which is restricted by the traditional limitations on appellate review. *See* Villano v. United States, 310 F.2d 680, 684 (10th Cir. 1962). The district court's conclusion, based on extensive testimony at the suppression hearing, that the evidence was "clear and convincing that this was a private action on behalf of Mr. Parks and his son," is amply supported

by the record and is not clearly erroneous. "A bare suspicion [that Parks carried a police commission] will not justify reversing the decision of the district court, which had the benefit and advantage of hearing the live testimony and observing the demeanor of the witnesses." Butterwood v. United States, 365 F.2d 380, 384 (10th Cir. 1966).

V

Gagnon contends the marijuana seized from the barn was improperly admitted since the government did not clearly establish an unbroken chain of possession. His argument appears to focus on the night of November 21, during which one pickup load of marijuana was temporarily stored in an admittedly less than impregnable garage owned by the sheriff of Hughes County. Although an intrusion by pranksters or tamperers is possible, we are confined in our review to the factual realities of the record. The law governing the admissibility of physical exhibits was stated by this court in Reed v. United States, 377 F.2d 891, 893 (10th Cir. 1967):

> [I]f, upon consideration of the nature of the article, the circumstances surrounding the preservation and custody of it and the likelihood of intermeddlers tampering with it, the trial judge deems the article to be in substantially the same condition as when the crime was committed, he may admit it into evidence, and his determination "that the showing as to identification and nature . . . is sufficient to warrant reception of an article in evidence may not be overturned except for a clear abuse of discretion."

(Quoting Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960)). *See* O'Quinn v. United States, 411 F.2d 78 (10th Cir. 1969); Rosemund v. United States, 386 F.2d 412 (10th Cir. 1967); Brewer v. United States, 353 F.2d 260 (8th Cir. 1965). Since there was no affirmative showing that the marijuana was tampered with, we cannot say the trial judge abused his discretion in admitting the marijuana in evidence. United States v. Von Roeder, 435 F.2d 1004 (10th Cir. 1970).

VI

We also find no merit in Gagnon's claim that the district court erred in instructing the jury that 21 U.S.C. § 802(15),

which defines marijuana as the plant cannabis sativa L, comprehends other forms of the plant and prohibits the possession of all varieties of marijuana. We dealt with this precise issue in United States v. Ludwig, 508 F.2d 140 (10th Cir. 1974), and again in United States v. Spann, 515 F.2d 579 (10th Cir. 1975). We there said:

> The keystone of [defendant's] argument is, of course, that there are three distinct species of plants known collectively as marijuana; that Congress intended to criminalize only one species of marijuana; and that a contrary interpretation of the pertinent sections would leave the average citizen without sufficient notice of the activity sought to be prohibited. This same argument has been made in numerous cases and has been uniformly rejected . . . . [T]he government's expert chemist testified that the "different types" of marijuana are the same, and the defendant's expert testified that the "different types" of marijuana are distinct from each other. Having considered that testimony, the trial court instructed the jury that the statutory definition of marijuana included [other forms of cannabis] as well as Cannabis sativa L. We perceive no reason for concluding as defendant would have us do, that the instruction erroneously stated the law . . . .

Ludwig, 508 F.2d at 142, quoted in *Spann*, 515 F.2d at 581-82.

VII

Gagnon claims error based on the district court's admission of in-court identifications. The district court's determination that all in-court identifications of Gagnon were based on independent sources and were not tainted by prior, allegedly suggestive, photo line-ups is adequately supported by the record. *See* Starkey v. Wyrick, 555 F.2d 1352, 1354-55 (8th Cir. 1977).

VIII

We also are not persuaded that the court abused its discretion in admitting the testimony of Jane Bates, the government's expert witness. Mustang Fuel Corp. v. Youngstown Sheet and Tube Co., 516 F.2d 33 (10th Cir. 1975) (trial judge's determination that witness is qualified as expert is conclusive unless clearly erroneous); Phelps Dodge Corp. v. Atchison, T. & S.F. Ry., 400 F. 2d 20 (10th Cir. 1968) (acceptance or

rejection of expert witness qualifications is matter for trial court's discretion).

IX

We fail to see any merit in Gagnon's remaining argument that his right to a fair trial was prejudiced by the indictment's allegation that Gagnon possessed approximately 1,300 pounds of marijuana, when the evidence produced at trial purportedly showed a lesser amount. Our review indicates there is sufficient evidence in the record to support the charge that Gagnon possessed 1,300 pounds of marijuana. Moreover, we have consistently held "that the presence and identity of the drug is the thing and the quantity of it is not important." United States v. Estell, 539 F.2d 697, 699 (10th Cir. 1967); United states v. Sudduth, 458 F.2d 1222, 1224 (10th Cir. 1972).

AFFIRMED.

APPENDIX B

Constitution of the United States

Amendment [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.